

WILL MODERN SLAVERY LEGISLATION BECOME A REALITY IN CANADA?

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With the introduction of Bill S-211 (the proposed "Modern Slavery Act" or the "Bill") in the Senate on February 5, 2020,^[1] Canadian legislators are taking a second attempt at passing legislation that addresses the serious human rights and supply chain issue of modern slavery after Bill C-423 did not make it past the first reading in 2018 due to lack of political momentum. The International Labour Organization ("ILO") estimates that there were 152 million children in child labour in 2019,^[2] while World Vision Canada estimates that 1,200 Canadian companies could be importing goods linked to modern slavery worth \$34 billion annually^[3]. This article will examine how the Bill aims at addressing this supply chain issue before discussing a few recommendations that businesses can contemplate before the Bill or similar legislation becomes law.

Bill S-211 at a Glance

It is unclear if the Bill in its current form will receive royal assent. Therefore, readers should be mindful that recommendations from the 2019 public consultation, as well as current parliamentary debates might result in amendments to the current draft of the Bill.

Definition of Modern Slavery

The Bill aims to combat child labour and forced labour in the supply chains of entities doing business in Canada. The Modern Slavery Act defines these two primary forms of modern slavery as:

child labour

labour or service provided, or offered to be provided, in Canada by persons under the age of 18 years under circumstances that are contrary to the laws applicable in Canada or provided or offered outside Canada under circumstances that, if provided or offered in Canada, would be contrary to the laws applicable in Canada.

forced labour

labour or service provided, or offered to be provided, by a person under circumstances that could reasonably be expected to cause the person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide or offer to provide the labour or service.

While other forms of modern slavery exist (e.g. forced marriage, debt servitude), the Bill focuses on these two primary forms of modern slavery to implement Canada's international commitments under the fundamental

conventions of the ILO, such as the Abolition of Forced Labour Convention^[4] and the Worst Forms of Child Labour Convention.^[5] The Bill also amends the Customs Tariff^[6] to allow the Governor in Council to prohibit the importation of goods manufactured or produced by forced labour or child labour.

The Bill would apply only to entities that meet particular criteria and perform certain prescribed actions. To be considered an "entity" under the Bill, a corporation, trust, partnership or other unincorporated organization must meet one of the following criteria:

Entities Covered by the Bill are Broadly Defined

- a) be listed on a stock exchange in Canada;
 - or
 - i. have a place of business in Canada
 - ii. do business in Canada, or
 - iii. have assets in Canada
 - and, meet at least 2 of the following conditions^[7]
 - i. have \$20 million in assets,
 - ii. have generated at least \$40 million in revenue, or
 - iii. employ an average of at least 250 employees;
- c) be prescribed by regulations

Furthermore, the Bill only applies to entities that: (a) produce or sell goods in Canada or elsewhere; (b) import into Canada goods produced outside Canada; or (c) control an entity engaged in either of the above.

These actions are defined quite broadly under the Bill in order to be as widely applicable as possible. As a result, the concept of production of goods under the Bill includes not only the manufacturing of goods, but also the growing, extraction and processing of goods. It should be noted, however, that the Bill does not apply to businesses that provide services.

Furthermore, the concept of control includes any manner of control, whether it be direct or indirect. Control can also be deemed to exist when an entity controls a second entity that controls or is deemed to control a third entity, thereby piercing through complex corporate structures.

The Bill is also binding on the government, suggesting that greater disclosure and due diligence may be required in the awarding of future public contracts.

Reporting Obligations Created by the Bill

The Bill creates an annual reporting obligation for entities to which the law applies. This would require subject entities to submit a report on or before May 31 of each year to the Minister of Public Safety and Emergency

Preparedness (the "Minister"). Generally, the report must set out the steps taken during the previous financial year to prevent and reduce the risk of forced labour or child labour at any step of the production of the goods, whether produced or imported by the entity.

Moreover, the report must include information regarding:

- a. the entity's structure and the goods that it produces or imports;
- b. the entity's policies in relation to forced labour and child labour;
- c. the entity's activities that carry a risk of forced labour or child labour being used and the steps taken to assess and manage that risk;
- d. any measures taken to remediate any forced labour or child labour; and
- e. the training provided to employees on forced labour and child labour.

Finally, the report must be made publicly available in a prominent place on the entity's website. It is notable that this proposed legislation does not impose any due diligence requirements on subject entities, contrary to the approach taken in other jurisdictions. It remains to be seen if such a requirement will be a part of the final draft of the Bill before it becomes law.

Enforcement Authorities Will Be Given Broad Powers

The Bill foresees significant and detailed enforcement capabilities for law enforcement. Enforcement authorities designated by the Minister may enter any place in which they have reasonable grounds to believe there is anything or any document to which the Bill applies. In performing an examination, the enforcement authority is granted broad investigation and evidence-gathering powers.

The owner or person in charge of the place, as well as every person in the place, must give all assistance reasonably required by the enforcement authority to carry out the examination. They must also provide any documents, information or data that is reasonably required.

Furthermore, if the place being examined is a dwelling-house, the enforcement authority may enter with a warrant issued ex parte by a justice of the peace. If this current draft of the Bill receives royal assent, the relevant authorities will have significant tools to enforce the requirements under the proposed legislation.

Penalties and Director Liability Will Give the Law Teeth

Although the penalties under the Bill are not as strict as in other jurisdictions, they still have a deterrent effect on entities that are subject to the law. All of the offences under the Bill are punishable on summary conviction and liable to a fine of up to \$250,000. Any person or entity may be convicted of the following offences:

- Failing to comply with the reporting obligation, including both the requirement to submit an annual

report to the Minister and to make said report publicly available;

- Failing to assist an enforcement authority during the course of an examination;
- Failing to comply with an order to comply made by the Minister;
- Obstructing or hindering an enforcement authority from exercising its powers or performing its duties or functions under the Bill; and
- Knowingly making a false or misleading statement, or providing false or misleading information, to the Minister or an enforcement authority.

Officers, directors, agents and mandataries of the person or entity who directed, authorized, assented to, acquiesced in or participated in the commission of an offence are party to the offence and can be held personally liable, whether or not the entity is prosecuted or convicted.

For offences other than false or misleading statements or information, the entity is presumed to have committed the offence if it is proven that the offence was committed by an employee or agent of the entity, whether or not the employee or agent is identified or prosecuted. An entity may rebut this presumption if it establishes that it exercised due diligence to prevent the commission of the offence, thus encouraging subject entities to enhance their compliance and training programs to reduce any potential liability under the proposed legislation.

Examples of Other Jurisdictions That Have Passed Modern Slavery Legislation

Below we have summarized the modern slavery legislation that has been passed in other jurisdictions. All of these laws contain a form of reporting obligation, similar to the Canadian Bill. The French and Dutch laws also contain due diligence obligations and come with significantly higher maximum penalties as a result.^[8] It remains to be seen whether Canada will adopt any elements of the legislation adopted by these jurisdictions.

Law (Jurisdiction)	In Force	Applies to	Maximum penalties
Modern Slavery Act, 2015 (UK) ^[9]	Oct. 29, 2015	Organizations doing business in the UK, with over £36 million annual global revenue	Theoretically unlimited
Modern Slavery Act, 2018 (Australia) ^[10]	Jan. 1, 2019	Entities doing business in Australia having, over \$100 million annual revenue	None

Transparency in Supply Chains Act of Jan. 1, 2012 2010 (California) [11]	Manufacturing and retail companies doing business in California, with over \$100 million in annual global revenue None
Duty of Vigilance (France) [12] Mar. 27, 2017	French companies having over 5,000 employees. Foreign companies having over 10,000 employees €10 million
Child Labour Due Diligence Act Jan. 1, 2022 [14] (Netherlands) [13]	Entities which supply goods or services to Dutch consumers Greater of €750 000 or 10% of worldwide revenue. [15]

Recommendations

Although no binding Canadian modern slavery legislation is in effect yet, Canadian businesses can consult multiple sources to enhance their corporate governance and compliance programs in preparation for upcoming regulatory changes. The following are useful sources that can be used by entities as a starting point to address the human rights and reputational risk that lurks in their supply chains:

Bill S-211 is currently at second reading in the Senate, suggesting that this second attempt of passing modern slavery legislation will likely be more successful than its predecessor Bill C-423. McMillan's International Trade Group will continue monitoring the progress of Canadian modern slavery legislation and will provide an update when Canadian modern slavery legislation becomes a reality for Canadian businesses.

by Jonathan O'Hara, Chris Scheitterlein, Thomas van den Hoogen

[1] [An Act to enact the Modern Slavery Act and to amend the Customs Tariff](#), Bill S-211, First Reading, February 5, 2020.

[2] [World Day Against Child Labour 2019: Children shouldn't work in fields, but on dreams!](#), International Labour Organization,, June 12, 2019.

[3] [A Call To Action: Ending The Use Of All Forms Of Child Labour In Supply Chains](#), Standing Committee on Foreign Affairs and International Development.

[4] [Abolition of Forced Labour Convention](#), International Labour Organization, 1957.

[5] [Worst Forms of Child Labour Convention](#), International Labour Organization, 1999.

[6] Customs Tariff, SC 1997, c 36.

[7] For at least 1 of its 2 most recent financial years, based on its consolidated financial statements.

[8] The Dutch law pertains exclusively to child labour.

[9] [Modern Slavery Act 2015](#), UK Public General Acts.

[10] [Modern Slavery Act 2018](#), Federal Register of Legislation (Australia).

[11] [An act to add Section 1714.43 to the Civil Code, and to add Section 19547.5 to the Revenue and Taxation Code, relating to human trafficking](#), Senate Bill No. 657 (California).

[12] [LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre \(1\)](#), National Assembly (France).

[13] [Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming vande levering van goederen en diensten die met behulp van kinderarbeid tot stand zijngekomen \(Wet zorgplicht kinderarbeid\)](#), Kingdom of the Netherlands.

[14] Speculative date of coming into force.

[15] With the possibility of up to 2 years' imprisonment for directors found liable, upon multiple offences within a 5-year period.

[16] [Due Diligence Guidance for Responsible Business Conduct](#), OECD, 2018

[17] [Children Are Everyone's Business Workbook 2.0, Integrating Children's Rights into your Business](#), impact assessments and sustainability reporting UNICEF, 2014.

[18] [List of Goods Produced by Child Labor or Forced Labor](#), US Department of Labor, September 20, 2018.

[19] [Guidelines for multinational enterprises, OECD](#), 2011.

[20] [Guiding Principles on Business and Human Rights](#), United Nations, 2011

[21] [CSR toolkit](#), Government of Canada, 2015.

[22] [Due Diligence Guidance for Responsible Mineral Supply Chains](#), OECD, 2016.

[23] [Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector](#), OECD, 2017.

[24] [Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, International Labour Organization, 2017](#).

[25] [Voluntary Principles](#), Extractive Industry, 2000.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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